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CPLR 7102: Court Vacates Replevin Since Summons and Complaint Was Not Promptly Served upon Defendant in Possession

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ARTICLE 41—TRIAL BY JURY

CPLR 4111(c): Case arising under CPA illustrates utility of CPLR provision.

In *Kennard v. Welded Tank & Construction Co.*,¹⁵⁹ an action was commenced against the manufacturer of a water tank, Welded Tank & Construction Co. (Welded), and a component part manufacturer, Colorado Fuel & Iron Co. (C.F. & I.), for injuries resulting from the explosion of Welded's water tank. Welded thereupon cross-claimed against C.F. & I. alleging breach of warranty. Subsequently, the jury returned a general verdict against both defendants on plaintiff's negligence claim, but returned special findings on the cross-claim that C.F. & I. was not negligent.¹⁶⁰ In response to motions by the plaintiff and Welded to resubmit the case to the jury, or, in the alternative, to order a new trial, the court, acceding to the mandatory language of CPA 459,¹⁶¹ resolved the inconsistencies in favor of the special findings, and dismissed the plaintiff's claim as well as Welded's cross-claim against C.F. & I. On appeal, a divided court held that the refusal of the lower court to resubmit the case to the jury or order a new trial was not reversible error.

In drafting CPLR 4111(c), the legislature vested the trial court with the discretion to direct the jury to further consider its answers or order a new trial in lieu of directing a judgment in accordance with the special findings.¹⁶² Hence, as noted by the Court of Appeals,¹⁶³ the problems presented by the *Kennard* facts should not recur under the CPLR.

ARTICLE 71—RECOVERY OF CHATTEL

CPLR 7102: Court vacates replevin since summons and complaint was not promptly served upon defendant in possession.

Ancillary to an action for the recovery of a chattel, CPLR 7102 authorizes seizure of the chattel by a sheriff on behalf of the plaintiff

¹⁵⁹ 26 Misc. 2d 1000, 209 N.Y.S.2d 479 (Sup. Ct. Nassau County 1961), *aff'd*, 27 App. Div. 2d 578, 277 N.Y.S.2d 817 (2d Dep't 1966), *aff'd*, 25 N.Y.2d 324, 253 N.E.2d 197, 305 N.Y.S.2d 477 (1969).

¹⁶⁰ The interrogatories were submitted to the jury in order to facilitate the trial court's determination of third-party actions instituted by Welded against C.F. & I. Statutory authorization for such interrogatories was provided by CPA 193-a(5), and is now covered by CPLR 4111.

¹⁶¹ CPA 459 directed that "where a special finding is inconsistent with a general verdict, the former controls the latter and the court must render judgment accordingly."

¹⁶² CPLR 4111(c). See SECOND REPORT 235.

¹⁶³ *Kennard v. Welded Tank & Constr. Co.*, 25 N.Y.2d 324, 328, 253 N.E.2d 197, 199, 305 N.Y.S.2d 477, 480 (1969).

without requiring a court order.¹⁶⁴ However, if an action is not then pending, a summons and complaint must be served upon the defendant in possession, before, after, or together with the writ of replevin.¹⁶⁵ The failure to strictly comply with this provision does not affect the validity of the replevin if the defendant thereafter becomes a party to the action, *i.e.*, makes a motion to reclaim or impound the chattel, or gives notice of exception to the surety.¹⁶⁶ Moreover, an untimely return of proof of service by the sheriff may be cured by an order *nunc pro tunc*.¹⁶⁷

In *Sears Roebuck & Co. v. Austin*,¹⁶⁸ the defendant moved to quash a requisition on the ground that a summons and complaint had not been served. In opposition the plaintiff contended that the motion was improper since it was not expressly authorized under the CPLR. However, the court rejected this argument, holding that a practitioner may always move to nullify a step illegally taken by his adversary. Furthermore, the court reasoned that limiting the defendant to the relief prescribed under the CPLR could pose a constitutional dilemma in view of his financial position.¹⁶⁹

On the merits, the court viewed the failure to serve the summons and complaint as grounds to vacate the requisition. In the process of its decision, the court expressed its disapproval with *Kurzweil v. Story & Clark Piano Co.*,¹⁷⁰ which held that the seizure of a chattel gave the court in rem jurisdiction and consequently a judgment rendered thereon was not void because of failure to serve a summons and complaint. Rather, the court in *Sears* relied heavily on *Devonia Discount Corp. v. Bianchi*,¹⁷¹ wherein the failure to serve a summons was viewed as a defect which divested the court of jurisdiction. Although *Devonia* is no longer considered valid as precedent in view of CPLR 7103(c),¹⁷² the court adopted its rationale since 7103(c) was inapplicable to the facts in *Sears*. Thus, the court concluded that without proof of service upon the defendant, the underlying action to recover the chattel must

¹⁶⁴ CPLR 7102(f) provides that upon receipt of the requisite papers the sheriff shall seize the chattel and unless within three days the sheriff is served with either a notice of exception to plaintiff's surety, a notice of motion for an impounding order or the necessary papers to reclaim the chattel, he shall deliver possession of the chattel to the plaintiff.

¹⁶⁵ See 7B MCKINNEY'S CPLR 7102, commentary 390 (1963).

¹⁶⁶ CPLR 7103(c).

¹⁶⁷ CCA 411.

¹⁶⁸ 60 Misc. 2d 908, 304 N.Y.S.2d 131 (N.Y.C. Civ. Ct. N.Y. County 1969).

¹⁶⁹ Cf. *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁷⁰ 95 Misc. 484, 159 N.Y.S. 231 (N.Y.C. Ct. 1916).

¹⁷¹ 241 App. Div. 838, 271 N.Y.S. 413 (2d Dep't 1934) (per curiam).

¹⁷² FOURTH REP. 256.

be dismissed. And, without the underlying action, the replevin action was no longer ancillary, and must therefore be vacated.

Although the defendant in possession of a chattel is protected to a degree by his statutory right to reclaim¹⁷³ or to move for an order impounding the chattel,¹⁷⁴ and by the plaintiff's undertaking,¹⁷⁵ it nonetheless is clear that sufficient notice must be afforded the defendant.¹⁷⁶ Thus, the refusal of the court in *Sears* to follow the *Kurzweil* holding, which previously had been emasculated¹⁷⁷ and questioned,¹⁷⁸ serves as a reminder to the practitioner to commence an action promptly when seeking to avail himself of the ancillary remedy of replevin.

NEW YORK CITY CIVIL COURT ACT

CCA 1908: Absence of express statutory authority is not a bar to recovery of necessary litigation expenses.

It can hardly be denied that an examination before trial of an adverse party has become a necessary procedure in the prosecution of a lawsuit. Likewise, when circumstances so dictate, an interpreter at the examination is equally as important.¹⁷⁹ However, the question arises whether a victorious litigant in the New York City Civil Court can recover disbursements for such expenses from his opponent.

In *Santiago v. Johnson*¹⁸⁰ the plaintiff sought an order disallowing expenditures of this nature as taxable costs on the ground that CCA 1908¹⁸¹ did not grant the authority for the assessments. Nevertheless, recovery was permitted pursuant to the preamble of CCA 1908 which limits the allowable disbursements as provided therein "[e]xcept where the contrary is specifically provided by law. . . ." And, the court held that CPLR 8301(a)(9) was the specific provision allowing the recovery of expenses of an examination before trial.

While the utilization of 8301(a)(9) is undoubtedly proper,¹⁸² its adoption through the *preamble* of CCA 1908 is somewhat tenuous. In-

¹⁷³ CPLR 7103(a).

¹⁷⁴ CPLR 7103(b).

¹⁷⁵ CPLR 7102(e).

¹⁷⁶ *Cf. Sniadick v. Family Fin. Corp.*, 395 U.S. 337 (1969).

¹⁷⁷ *Devonia Discount Corp. v. Bianchi*, 241 App. Div. 838, 271 N.Y.S. 413 (2d Dep't 1934) (per curiam). *See also* *Florence Trading Corp. v. Rosenberg*, 128 F.2d 557 (2d Cir. 1942).

¹⁷⁸ *See* 7A W. K. & M. ¶ 7102.02.

¹⁷⁹ *Cf. People ex rel Levy v. Grant*, 37 Misc. 430, 75 N.Y.S. 290 (Sup. Ct. N.Y. County 1902).

¹⁸⁰ 61 Misc. 2d 746, 305 N.Y.S.2d 717 (N.Y.C. Civ. Ct. Kings County 1969).

¹⁸¹ CCA 1908 is the New York City Civil Court provision governing the allowance of costs to a party in an action or appeal.

¹⁸² *See* 8 W. K. & M. ¶ 8301.27.